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Department of Veterans Affairs
Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department's employees. Topics covered in this issue include hostile work environments, "speak English only" rules, retaliation, nurse promotions, sexual harassment, and disqualification determinations made by HR personnel in selection/promotion actions.

Also included in this issue are questions and answers relating to the use of "telework", also known as telecommuting, as a reasonable accommodation for disabled employees.

The *OEDCA Digest* is available on the World Wide Web at: http://www.va.gov/orm/oedca.html.

Charles R. Delobe

I

DISSATISFACTION WITH "MANAGEMENT STYLE" IS NOT A SUFFICIENT GROUND FOR FILING AN EEO COMPLAINT

The following case presents a good example of why many EEO claims about "hostile" supervisors are dismissed at the outset for procedural reasons, without even an investigation being conducted into the merits of the claim.

The complainant, a nurse in a Primary Care unit, accused her nurse manager [hereinafter referred to as the "supervisor"] of racial discrimination and harassment following several incidents that she claimed resulted in a "hostile" work environment. The incidents she cited as examples of the harassment are as follows: the supervisor pointed her finger at the complainant during a meeting; the supervisor stated during the meeting that she was going to use a "shotgun" management style; the supervisor verbally counseled the complainant regarding her body language and about being "snippy"; the Chief of Primary Care praised the supervisor's performance; the Chief of Primary Care delegated assignments to the supervisor; the supervisor stated that the "Gold Team", of which the complainant was a member, "sucks"; and the supervisor told Gold Team members during a meeting that disputes and disagreements concerning primary care issues should be aired within the Primary Care unit rather than the Chief of Staff's office.

After reviewing the complaint, the VA's Office of Resolution Management dismissed it for "failure to state a claim", a ground for dismissal found in EEOC's complaint processing regulations at 29 C.F.R. § 1614.107(a)(1). Because the claim was dismissed, it was not investigated.

The complainant appealed the dismissal to the Equal Employment Opportunity Commission's Office of Federal Operations (OFO) in Washington, D.C. Upon review, the OFO affirmed the ORM's dismissal. In examing the above "incidents", OFO concluded that nothing concrete happened to the complainant. Instead, she is essentially complaining about her supervisor's no-nonsense management style, of which she clearly disapproves.

It is not unusual – indeed it is quite common – for employees to express displeasure concerning a supervisor's management style. Every office or work unit has its share of individuals who express such displeasure. Simple displeasure with one's supervisor, however, is not a sufficient ground for filing a discrimination complaint.

In order for a discrimination complaint to state a legal claim, a complainant must generally show that he or she is "aggrieved", which means that some action was taken that resulted in a tangible loss or harm. Hurt feelings and bruised egos are not tangible harms or losses. In this case, when viewed individually, none of the incidents

alleged in the complaint, including the verbal counseling, involved any concrete action taken aganst the complainant. Hence, none of the incidents were sufficient to state a claim of discriminatory disparate treatment.

The OFO next examined whether the incidents stated a legal claim of discriminatory harassment. It is sometimes possible for a number of incidents, when viewed collectively, to state a claim of discriminatory harassment, even if none of the individual incidents that comprise the claim resulted in any tangible harm or loss. Harassment claims, by definition, generally involve numerous incidents that may not be actionable individually, but become actionable over a period of time because of the cumulative affect of the individual incidents on the employee's work environment. However, the Commission rightly concluded that this complaint also failed to state a claim of harassment because the incidents, even when viewed collectively, were not severe or pervasive enough to create a hostile or abusive work environment.

II

SELECTING OFFICIAL'S REQUIREMENT THAT ONLY ENGLISH BE SPOKEN IN RECEPTION AREA NOT EVIDENCE OF NATIONAL ORIGIN DISCRIMINATION

An Hispanic employee, hereinafter referred to as the "complainant", filed an EEO complaint alleging national origin discrimination because she was not selected for an advertised vacancy. Following a hearing, an EEOC administrative judge issued a decision finding no discrimination. OEDCA accepted the decision.

According to the record, the judge found that the selecting official and the panel members collectively testified that the complainant did not demonstrate the requisite level of confidence necessary for the position during the interview. She did not adequately communicate answers to interview questions; she chose to read from a prepared script instead of attempting to engage in a dialogue with the panel members. The judge found this to be a legitimate, nondiscriminatory reason for the decision not to select her.

In order to prevail on her complaint, the complainant would have had to prove by a preponderance of the evidence that the reason advanced for not selecting her was not the true reason, but was instead a pretext for discriminating against her because she is Hispanic. As proof of such pretext, the complainant pointed to a "speak English only" rule imposed by the selecting official, who was also the supervisor in her work unit.

After reviewing the circumstances and reasons for the rule, the EEOC judge concluded – correctly - that it was not evidence of national origin

discrimination. Specifically, the judge found that the rule was not an across-the-board prohibition against speaking Spanish in the workplace, but rather, simply a rule that English be spoken in the reception area where employees come into contact with the public, which includes many non-Spanish-speaking customers. The rule in question applied only to the reception area, and, moreover, did not prohibit employees from speaking Spanish with customers, if that was their preference. The judge therefore concluded that the rule was reasonable and justified by business necessity, and hence did not violate the provisions of EEOC's Compliance Manual dealing with "speak English only" rules in the workplace.

III

SUPERVISOR'S QUESTIONING OF EMPLOYEE ABOUT RELEASE OF PATIENT MEDICAL INFORMATION DID NOT HARM EMPLOYEE

In the first case discussed above, we noted that many complaints are dismissed at the outset for procedural reasons, without even an investigation being conducted into the merits of the claim. A frequent reason for the dismissal is the failure of the complainant to show that he or she has been "aggrieved" by the personnel action or incident at issue. Consider the following case.

An employee complained about her supervisor sending her an e-mail asking her to explain why she had accessed an electronic data file containing a patient's confidential medical record. She asserted that other employees in her section had also accessed similar information, but did not receive e-mail messages questioning their actions. The complainant was not disciplined as a result of the unauthorized access. Nevertheless, she filed an EEO complaint alleging, among other things, that the e-mail message was an act of reprisal and discrimination against her because of her prior EEO complaint activity and her disability.

After reviewing her complaint, an EEOC administrative judge dismissed it for procedural reasons, finding that the matter complained of resulted in no harm to the complainant and, hence, failed to state a claim. OEDCA agreed with the judge's decision and issued a final order accepting the dismissal action. Because this complaint was dismissed for procedural reasons, the judge was not required to hold a hearing or otherwise adjudicate the claim on its merits. This dismissal would have been proper – and indeed required under EEOC's regulations – even if the complainant had credible evidence that the supervisor actually sent the e-mail for discriminatory and retaliatory reasons!

Complaints of this nature are not unusual. Employees frequently file EEO complaints simply because of something a supervisor says or does - or does not

say or does not do - that they find upsetting. However upset they may be about the matter, unless they can demonstrate that they have suffered some actual loss or harm because of what was said or done (what courts generally refer to as "injury in fact"), their complaints will be dismissed for "failure to state a claim."

Currently, EEOC's regulations do not allow for the procedural dismissal of complaints because of "frivolousness." The reason, of course, is that what may seem frivolous to one person may be a matter of utmost concern to another. Nevertheless, while agencies and the EEOC are not allowed to dismiss claims or complaints simply because they seem frivolous, complaints that many might view as frivolous are often dismissed because they involve an event or events that do not result in any tangible harm or loss to the complainant. Because there is no tangible loss or harm shown, the complainant is not "aggrieved" by the matter. Because the complainant is not aggrieved, he or she fails to "state a claim."

IV

NO REPRISAL FOUND WHERE NO EVIDENCE OF PRIOR EEO COMPLAINT ACTIVITY

It is not unusual for employees to complain about reprisal (also sometimes called "retaliation"). Indeed, it is one of the most frequently raised claims in the Federal sector EEO complaint process. Often, however, an employee's understanding of the term "reprisal" is not the same as the legal definition of the term. The following is a case in point.

An employee complained that his supervisor had "harassed" him "on account of reprisal." [1] Specifically, the complainant alleged that the supervisor spoke to him in an "angry tone." An EEOC judge issued a summary decision (*i.e.*, a decision without a hearing) finding first, that the incident in question did not rise to the level of "harassment" and second, that there was no evidence of reprisal.

We discussed in the preceding case summary that claims will be dismissed if they "fail to state a claim" in the legal sense. A complainant fails to state a claim if he or she is unable to show a tangible loss or harm. Complaints of harassment fail to state a claim if the complainant is unable to show that the conduct complained of is so severe or pervasive as to cause a hostile work environment. Obviously, in this case, the complainant was unable to show either a tangible harm or severe or pervasive conduct.

In addition, the judge addressed the complainant's reprisal claim. To establish a *prima facie* case of reprisal, a complainant must show, at a minimum,

[1] The employee's complaint also included a separate claim about a nonselection.

that (1) he or she previously engaged in EEO activity, (2) the managenent official accused of retaliating was aware of that prior EEO activity, (3) the managenent official accused of retaliating took an adverse action against the complainant, and (4) there is some evidence indicating that the adverse action may have been caused by the complainant's prior EEO activity. Usually this is shown if the adverse action took place within a relatively short period of time after the complainant engaged in the EEO activity.

Keep in mind that a *prima facie* case does not establish that retaliation, in fact, occurred. Instead, it simply permits the inquiry to continue to the next analytical step -- examining management's reason for the action complained of and, if such a reason is articulated, the complainant's evidence, if any, that the reason given is not the true reason, but is instead a pretext for a retaliatory motive.

As noted above, the first element of *prima facie* proof of reprisal is evidence that the complainant engaged in some form of protected EEO activity prior to the incident or event that is the subject of the complaint. Such activity could include participation in the EEO complaint process as a complainant, witness, counselor, *etc*., or some form of tangible opposition to discrimination. Sometimes, complainants are unable to show this. In this case, the complainant was unable to point to any EEO activity he engaged in prior to the incident with his supervisor. Hence, the EEOC judge concluded that he was unable to establish a *prima facie* case.

It is not uncommon for complainants to claim "retaliation" by a supervisor for reasons that have nothing to do with prior EEO activity. This is because their understanding of the term "retaliation" is not the same as the legal definition of the term. For example, a supervisor might take some action against an employee, or treat the employee less favorably, because the employee said or did something to displease the supervisor. Such action by a supervisor is typically viewed by employees as "retaliation." However, unless what the employee said or did to displease the supervisor involved EEO activity -- *i.e*., participation in the EEO complaint process or opposition to prohibited discrimination -- the supervisor has not engaged in the type of illegal retaliation prohibited by Title VII of the Civil Rights Act and other relevant civil rights laws.

V

NURSE NONPROMOTION NOT DUE TO DISCRIMINATION

The complainant was serving as a Nurse II when a Nurse Professional Standards Board (NPSB or "Board") examined her qualifications for promotion to the grade of Nurse III. When the Board found her unqualified for promotion to the Nurse III grade, she filed a discrimi-

nation complaint alleging that her race was a motivating factor in the decision not to promote her. This case is a good example of how an EEO complaint could have been avoided if the complainant had exercised her right to request reconsideration of the Board's decision.

The criteria and procedures for promoting registered nurses in the VA are unlike those utilized in typical competitive or career-ladder (*i.e.*, non-competitive) promotion actions in the Federal personnel system. Unlike competitive promotion actions, nurses may be promoted to certain grades without the need for a vacancy, as the grades are linked, not to a specific position, but rather, to the individual's qualifications, performance, and scope of responsibilities. Moreover, unlike career-ladder promotions, nurses are not automatically entitled to promotion merely because of satisfactory or better-than-satisfactory performance. Instead, nurses must satisfy specific professional, performance, and educational criteria for the next higher grade, as stated in the *VA Nurse Qualification Standards*, in order to be promoted. Thus, nurses are occasionally passed-over for promotion, despite a record of above-average or even outstanding performance.

Evidence that the nurse has met the criteria is found in the nurse's annual proficiency report --*i.e.*, the performance appraisal prepared by the nurse's supervisor – and other documents contained in his or her official personnel folder (OPF).[2] The proficiency report summarizes the nurse's scope of responsibility, performance, and achievements for the previous year.

If the Board concludes, based on a review of the proficiency report and other documents, that the nurse has not met the criteria, it will recommend that the nurse not be promoted. If a nurse is not promoted, and the scope of his or her responsibility does not change, further promotion review will take place at intervals of 1 to 3 years, at the discretion of the Board. In the interim, however, the nurse, may request the Board to reconsider its initial decision if important information was not included in the materials presented to the Board.

The complainant in this case met the educational and years-of-experience requirements specified in the VA Nurse Qualification Standards, and had an overall performance rating of "High Satisfactory." The Board, however, notified her that she would not be promoted because she failed to satisfy the other promotion criteria. Specifically, the Board stated that her proficiency report contained no indication that she had (1) initiated and led interdisciplinary groups, and made significant contributions to the nursing profession. In addition, the Board found no evidence that her nursing practice was characterized

[2] The nurse does not actually appear before the Board. The Board's decision is based solely on documents pertaining to the candidate's qualifications, performance, achievements, and scope of responsibility.

by leadership and accomplishments in developing and implementing programs to improve delivery of patient care; and proficiency in clinical practice, administration, education, and research. The Board notified her that she could request reconsideration if she believed the Board's action was improper.

According to her supervisor's testimony, the complainant never told her that she was seeking promotion to Nurse III. The supervisor stated that, in her opinion, the complainant's nursing practice and experience satisfied all of the criteria for promotion to the Nurse III level. Moreover, had she known that the Board would be considering the complainant for promotion, she would have included the necessary documentation in the complainant's proficiency report. Finally, she testified that, upon learning of the Board's decision, she immediately prepared a revised proficiency report for the complainant, which documented all of the criteria required for promotion to Nurse III. The complainant, however, did not exercise her right to request the Board to reconsider its action. Instead, she filed an EEO complaint.

After reviewing the evidence of record, both an EEOC judge and OEDCA concluded that the complainant's failure to be promoted was not due to her race. There was no evidence anywhere in the record suggesting that the supervisor intentionally omitted information from the complainant's proficiency report for the purpose of preventing her promotion.

This complaint was unnecessary. Every employee is responsible for his or her career, and the complainant clearly should have informed her supervisor of the upcoming Board action at the time the supervisor was writing her proficiency report. Despite that failure, she might still have been promoted had she requested the Board to reconsider its action after the supervisor revised her proficiency report. Inexplicably, she did neither of the above.

VI

VA FOUND LIABLE FOR MANAGEMENT'S FAILURE TO ADDRESS EMPLOYEE'S SEXUAL HARASSMENT COMPLAINT

A disabled female employee who has cerebral palsy complained of frequent harassment by her male supervisor. The harassment included name-calling and negative remarks suggesting she was mentally retarded, notwitstanding the fact that she was fully capable of performing her job duties without the need for accommodation.

In addition to mocking her because of her disability, the supervisor sexually harassed her. The harasssment took the form of comments about the length of her skirts, invitations to lunch, and, on one occasion, reaching under her skirt and grabbing her thighs. The day following the incident, the supevisor

ordered her to get on her knees and scrub a headboard with a toothbrush, warning her that if she told anyone about the previous day's incident, he would fire her.

An EEOC administrative judge found that a preponderance of the evidence supported the complainant's claim that these events occurred, and that the supervisor's conduct constituted sexual harassment and harassment because of her disability. The judge found that the supervisor's conduct was unwelcome and that the touching incident was, by itself, sufficiently egregious to satisfy the "severe or pervasive" test established by the courts for determining whether conduct is sufficiently serious to rise to the level of unlawful harassment.

The next question, therefore, was whether the VA should be held liable for the harassment. As a general rule, an employer is liable for harassment by a supervisor. However, because the harassment in this case did not involve a tangible employment action, management could avoid liability[3] if it could show that (1) it exercised reasonable care to prevent and correct promptly the harassing behavior, and (2) the complainant unreasonably failed to take advantage of any corrective or preventive opportunities provided by management, or to avoid harm otherwise. In this case, management was unable to demonstrate either of these criteria.

According to the record, the complainant promptly complained to her supervisor's supervisor (*i.e.*, her second-level supervisor), but that official did nothing, essentially telling her to drop the matter. The complainant then reported it to the next higher-level official in the chain, the Chief of Environmental Services, and also requested a transfer. That official ordered the second-level supervisor -- the same official who told the complainant to drop the matter -- to investigate.

The second-level supervisor did a cursory inquiry -- so cursory in fact that she did not even take a statement from the complainant -- and later verbally told her supervisor that there was no evidence to support the complainant's claims. For reasons not explained in the record, the Chief eventually reassigned the complainant, but the reassignment took place some six to eight weeks after she had requested it. During this timeframe, the complainant alleged that her supervisor continued to harass her.

The EEOC judge correctly concluded that the above facts compelled a finding of agency liability. The judge noted that management failed to show that it exercised reasonable care to correct and prevent the harassing behavior. It continued for some six to eight weeks after she reported it. At the very least, it

[3] If a tangible employment action had occurred (*e.g.*, suspension, removal, demotion, *etc.*), management would have been automatically liable.

should have counseled the harasser and reassigned him, pending the outcome of the investigation. Moreover, the "investigation" into her claims was woefully inadequate and seemingly biased, given the failure to obtain a statement from the complainant. Rather than appointing the harasser's supervisor to investigate, management should have appointed an official who had no connection with the harasser or the complainant.

Second, management was unable to show that the complainant failed to take advantage of available corrective or preventive opportunities, or to avoid harm otherwise. The complainant acted reasonably – indeed, she did what she was supposed to do – and more. She promptly reported the harassment to upper-level management officials. Moreover, she even requested a transfer to avoid further contact with the harasser, something she was not required to do.

VII

DETERMINATION BY PERSONNEL SPECIALIST THAT COMPLAINANT WAS NOT QUALIFIED FOR PROMOTION NOT DUE TO RACE DISCRIMINATION

In every selection and promotion action, personnel specialists from the Human Resources Management Service will review the qualifications of applicants and, in many cases, refer only the best qualified among them to the selecting official for consideration.

As part of this process, HR often will notify one or more of the applicants that their failure to be referred to the selecting official was because either (1) they were not qualified for the subject vacancy, or (2) although qualified, they simply did not receive a high enough score in the rating and ranking process to "make the cut." Employees frequently file EEO complaints when they receive such a notice. The following case illustrates a few of the reasons why such complaints fail.

An employee, hereinafter referred to as the "complainant," applied for the position of Health Technician, GS-5/7. An HR specialist reviewed his application and determined that he lacked the requisite qualifications. She subsequently notified him and six other applicants that they were not referred to the selecting official for consideration because they were unqualified. The complainant then filed a complaint alleging that the HR specialist disqualified him because of his race.

Following a hearing, an EEOC judge concluded, and OEDCA agreed, that the employee's evidence was insufficient to establish even a *prima facie* case of discriminatory intent on the part of the HR specialist. The complainant, like most complainants in this type of case, was faced with two major hurdles. First, he had to prove that the HR

specialist who disqualified him was actually aware of his race. Second, he also had to prove that he was, in fact, qualified for the position. Moreover, even if he was able to establish a *prima facie* case, he would also have to prove that the explanation provided by the HR specialist for the disqualification was not the real reason, but was instead a pretext to mask a discriminatory motive.[4]

In this case, there was nothing in the complainant's application indicating his racial classification, and the HR specialist testified that she never met the complainant and was not otherwise aware of his race. The complainant presented no evidence to the contrary. This alone was sufficient to prevent him from establishing a *prima facie* case. In most cases, HR employees will not know the race of an applicant, thus negating the possibility of a racial motivation.

Moreover, even if the HR specialist were aware of the complainant's race, he was unable to prove that he was, in fact, qualified for the position. For example, he presented no evidence that he had the same qualifications as those applicants whom HR did find to be qualified. He did present evidence that HR had qualified him for the same position two years earlier. The evidence, however, also showed that a different specialist was responsible for that personnel action and, more importantly, the duties of the position had changed significantly since that time, and the complainant lacked the skills and experience now needed to do the job.

As noted above, even if complainants are able to prove both awareness of race and qualifications, the complainant will not prevail unless there is preponderant evidence that HR's reason for the disqualification is not the true reason, but is instead a pretext to mask a discriminatory motive.

For example, suppose a complainant presents credible proof at an EEO hearing that he or she does, in fact, have the requisite degree, training, and/or experience needed to qualify for the position. In response, suppose the HR specialist asserts that, such proof notwithstanding, the disqualification decision was proper under the circumstances because the complainant failed to include that information in his or her application or résumé. If that assertion is true, the complainant will not prevail.

Cases involving facts identical to those in the above example are not at all uncommon. Job applicants frequently omit critical information about their qualifications from applications and résumés. Contrary to popular belief, HR is not required to alert applicants of deficiencies in their application prior to disqualifying them. It is the applicant's responsibility to review the vacancy

[4] This assumes, of course, that there is no direct evidence of racial bias.

announcement carefully and provide all relevant information concerning qualifications at the time the application is submitted.

As is evident from the above discussion, qualification decisions made by HR personnel are generally very difficult to challenge in the EEO process.

VIII

WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION FOR DISABLED EMPLOYEES

(The Equal Employment Opportunity Commission recently issued the following fact sheet on the use of "telework" as a means of accommodating an employee's disability.)

Many employers are now allowing employees to work at home through telework (also known as telecommuting) programs. Telework has allowed employers to attract and retain valuable workers by boosting employee morale and productivity. Technological advancements have also helped increase telework options. President George W. Bush's "New Freedom Initiative" emphasizes the important role telework can have for expanding employment opportunities for persons with disabilities.

In its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02),* the Equal Employment Opportunity Commission said that allowing an individual with a disability to work at home may be a form of reasonable accommodation. *The Americans with Disabilities Act* (ADA) requires employers with 15 or more employees to provide reasonable accommodation for qualified applicants and employees with disabilities. Reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job, or gain equal access to the benefits and privileges of a job. The ADA does not require an employer to provide a specific accommodation if it causes undue hardship, *i.e.,* significant difficulty or expense.

Not all persons with disabilities need - or want - to work at home. And not all jobs can be performed at home. But, allowing an employee to work at home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense.

This fact sheet explains the ways that employers may use existing telework programs, or allow an individual to work at home as a reasonable accommodation.

1. Does the ADA require employers to have telework programs?

No. The ADA does not require an employer to offer a telework program to all employees. However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.

In addition, the ADA's reasonable accommodation obligation, which includes modifying workplace policies, might require an employer to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home. For example, an employer may generally require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its one-year rule for this individual.

2. May permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program?

Yes. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. However, an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective. (See Question 6.)

3. How should an employer determine whether someone might need to work at home as a reasonable accommodation?

This determination should be made through a flexible "interactive process" between the employer and the individual. The process begins with a request. An individual must first inform the employer that s/he has a medical condition that requires some change in the way a job is performed. The individual does not need to use special words, such as "ADA" or "reasonable accommodation" to make this request, but must let the employer know that a medical condition interferes with his/her ability to do the job.

Then, the employer and the individual need to discuss the person's request so that the employer understands why the disability might necessitate the individual working at home. The individual must explain what limitations from the disability make it difficult to do the job in the workplace, and how the job could still be performed from the employee's home. The employer may request information about the individual's medical condition (including reasonable documentation) if it is unclear whether it is a "disability" as defined by the ADA. The employer and employee may wish to discuss other types of accommodations that would allow the person to remain full-time in the workplace. However, in some situations, working at home may be the only effective option

for an employee with a disability.

4. How should an employer determine whether a particular job can be performed at home?

An employer and employee first need to identify and review all of the essential job functions. The essential functions or duties are those tasks that are fundamental to performing a specific job. An employer does not have to remove any essential job duties to permit an employee to work at home. However, it may need to reassign some minor job duties or marginal functions (*i.e.*, those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home. If a marginal function needs to be reassigned, an employer may substitute another minor task that the employee with a disability could perform at home in order to keep employee workloads evenly distributed.

After determining what functions are essential, the employer and the individual with a disability should determine whether some or all of the functions can be performed at home. For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs, some or all of the duties can be performed at home.

Several factors should be considered in determining the feasibility of working at home, including the employer's ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.

If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs. For example, an employee may need to meet face-to-face with clients as part of a job, but other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to review documents and write reports from home.

5. How frequently may someone with a

disability work at home as a reasonable accommodation?

An employee may work at home only to the extent that his/her disability necessitates it. For some people, that may mean one day a week, two half-days, or every day for a particular period of time (*e.g.,* for three months while an employee recovers from treatment or surgery related to a disability). In other instances, the nature of a disability may make it difficult to predict precisely when it will be necessary for an employee to work at home. For example, sometimes the effects of a disability become particularly severe on a periodic but irregular basis. When these flare-ups occur, they sometimes prevent an individual from getting to the workplace. In these instances, an employee might need to work at home on an "as needed" basis, if this can be done without undue hardship.

As part of the interactive process, the employer should discuss with the individual whether the disability necessitates working at home full-time or part-time. (A few individuals may only be able to perform their jobs successfully by working at home full time.) If the disability necessitates working at home part-time, then the employer and employee should develop a schedule that meets both of their needs. Both the employer and the employee should be flexible in working out a schedule so that work is done in a timely way, since an employer does not have to lower production standards for individuals with with disabilities who are working at home. The employer and employee also need to discuss how the employee will be supervised.

6. May an employer make accommodations that enable an employee to work full-time in the workplace rather than granting a request to work at home?

Yes, the employer may select any effective accommodation, even if it is not the one preferred by the employee. Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making workplaces accessible (*e.g.*, installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters. An employer can provide any of these types of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace. For example, an employee with a disability who needs to use paratransit asks to work at home because the paratransit schedule does not permit the employee to arrive before 10:00 a.m., two hours after the normal starting time. An employer may allow the employee to begin his or her eight-hour shift at 10:00 a.m., rather than granting the request to work at home, if this would work with the paratransit schedule.

7. How can employers and individuals with disabilities learn more about reasonable accommodation, including working at home?

Employers and individuals with disabilities wishing to learn more about working at home as a reasonable accommodation can contact the EEOC at (202) 663-4691 (voice) and (202) 663-7026 (TTY). General information about reasonable accommodation can be found on EEOC's website at www.eeoc.gov/policy/guidance.html. (E*nforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*; revised 10/17/02). This website also provides guidance on many other aspects of the ADA.

The government-funded Job Accommodation Network (JAN) is a free service that offers employers and individuals ideas about effective accommodations. The counselors perform individualized searches for workplace accommodations based on a job's functional requirements, the functional limitations of the individual, environmental factors, and other pertinent information. JAN can be reached at 1-800-526-7234 (voice or TDD); or on their website at www.jan.wvu.edu/soar.